

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

Original + Affidavit of Mailing

77-1271

To be argued by
RHONDA FIELDS

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1271

UNITED STATES OF AMERICA,

Appellee,

—against—

ISMAEL RAMOS,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

DAVID G. TRAGER,
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Eastern District of New York.

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Docket No. 77-1271

UNITED STATES OF AMERICA,

Appellee,

—against—

ISMAEL RAMOS,

Appellant.

BRIEF FOR APPELLEE

Preliminary Statement

Ismael Ramos appeals from a judgment of the United States District Court for the Eastern District of New York (Thomas C. Platt, J.) entered on May 19, 1977 convicting him, after his plea of guilty to a one count information, of possession of 17 ounces of heroin with intent to distribute, in violation of 21 U.S.C. § 841(a)(1). Appellant was sentenced to a term of ten years imprisonment and a special parole term of ten years. He is presently incarcerated.

On appeal, appellant contends that his sentence should be vacated and the case remanded for resentencing before another judge. He bases the claim on three arguments: *first*, that the district judge improperly considered his refusal to testify for the Government at the trial of his co-conspirator, thus penalizing him for exercising his Fifth Amendment privilege against self-incrimination, *second*, that the length of the sentence

constituted cruel and unusual punishment under the Eighth Amendment; and *third*, that the sentencing procedure violated his right to due process under the Fifth Amendment.

Statement of Facts

On March 18, 1977, appellant, represented by Mr. Chris Termini of the Legal Aid Society, appeared before Judge Platt, waived indictment and pleaded guilty to a one count information charging him with possession of approximately 17 ounces of heroin with intent to distribute, in violation of 21 U.S.C. § 841(a)(1).

On May 19, 1977, appellant appeared for sentencing. Before sentence was imposed, appellant's attorney, Mr. Termini, addressed the court. In his statement, Termini asked the judge to show leniency to his client, citing his relatively unblemished criminal record, his close family ties, his role in the narcotics transaction which had led to his arrest, which was characterized as that of a middleman (A.29-A.30), and his admission of guilt (A.31).¹

Mr. Termini then addressed himself to a portion of the probation report which reflected that appellant had refused to cooperate with the Government and to testify against a co-conspirator.² It was pointed out that following his arrest appellant had supplied information to the Government leading to the arrest of his co-conspira-

¹ References preceded by the letter "A" are to pages of appellant's appendix.

² Appellant was named as an unindicted co-conspirator in indictment 77 Cr. 152 charging Juan Balaguer with violating 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2 (possession of heroin with the intent to distribute); 21 U.S.C. § 846 (conspiracy); and 18 U.S.C. §§ 1952(a)(3) and 2 (interstate travel to promote the distribution of heroin).

tor (A.30), but that he refused to testify due to fear of recrimination against his family (A.31). Additionally, counsel raised the question of whether or not the prosecution had actually requested such cooperation from appellant, but the Assistant United States Attorney confirmed that the Government did want appellant to testify at the trial of the co-conspirator (A.32-A.33).

Judge Platt then offered to adjourn the proceedings to permit appellant to consult with his attorney and to give him a final opportunity to decide to cooperate with the Government (A.33-A.36). However, defense counsel advised the court that his client did not wish to reconsider his decision (A.36). Appellant then spoke and asked the court, in imposing sentence, to consider the fact that he was needed at home (A. 37). Judge Platt thereupon proceeded to the sentencing. He began by stating that he had considered the pre-sentence report and the statements made to him by counsel and appellant. He also noted that he was taking "particular cognizance of the fact that we're dealing with quantities of heroin and all of the facts as set forth in the Probation Report." In addition, he stated that the mitigating circumstances of appellant's guilty plea were being balanced against the refusal to testify for the Government (A.37). The court then sentenced appellant as indicated above: ten years imprisonment and a ten year special parole term.

ARGUMENT

Appellant was properly sentenced.

As noted above, appellant argues that his sentence was unconstitutional and unlawful. He contends first that the court penalized him because he exercised his Fifth Amendment privilege against self-incrimination and refused to testify for the Government in the upcoming

trial of his co-conspirator. He also claims that the sentence constituted a violation of the Eighth Amendment because it was "grossly unjust" and that it was imposed in violation of the Fifth Amendment's due process clause because it was "arbitrary." We submit that appellant's contentions are without merit.

A. The district court did not abuse its discretion in imposing sentence

We note at the outset that this Court has consistently recognized that sentences are not generally reviewable. *United States v. Seijo*, 537 F.2d 694, 700 (2d Cir. 1976), *cert. denied*, — U.S. — 1977), and a sentence which is imposed in accordance with procedural requirements and which is within statutory limits will not be disturbed unless there is a showing that the judge acted on the basis of false information or false assumptions, *United States v. Robin*, 545 F.2d 775, 779 (2d Cir. 1976); *United States v. Stein*, 544 F.2d 96, 101-102 (2d Cir. 1976), or that he sentenced in "a fixed and mechanical way." *United States v. Schwartz*, 500 F.2d 1350, 1352 (2d Cir. 1974). Appellant's sentence is well within the statutory limits, and there is no assertion that the court sentenced on the basis of incorrect information.

Rather, as noted above, appellant's primary contention is that the sentence he received was based solely on the fact that he refused to cooperate with the Government and that the court thus improperly penalized him for exercising his Fifth Amendment privilege against self-incrimination. Review of the sentencing minutes, however, reveals that lack of cooperation was not the only factor considered by Judge Platt. The record shows that the court listened to statements of appellant and his attorney and that the judge read letters which had been sent to him by appellant's family (A.29). In addition, when passing sentence, the court stated that it had read

the probation report and was taking "particular cognizance of the fact that we're dealing with quantities of heroin and all the facts as set forth in the Probation Report."³ The court further indicated that it had considered the additional fact that the defendant had waived indictment and had pleaded guilty. Thus, we believe that it is incorrect to argue as appellant does, that the court took into account *only* the refusal to cooperate with the Government. On the contrary, as the record shows all relevant factors were considered by the judge. See, *United States v. Negron*, 548 F.2d 1085 (2d Cir. 1977).

Moreover, appellant can hardly argue, as he seeks to do in his brief, that his refusal to testify was motivated by Fifth Amendment considerations. The only reason ever raised by appellant for not testifying was alleged fear on his part for the safety of his family (A.31, A.33). Indeed, prior to sentencing, appellant had already effectively waived his Fifth Amendment rights by meeting with the prosecution and giving information to the Government leading to the arrest of his co-conspirator (A.34).

Furthermore, it was entirely proper for Judge Platt to weigh, in the balancing of mitigating and aggravating factors, appellant's refusal to testify at the trial of his co-conspirator. In *United States v. Sweig*, 454 F.2d 181, 183-184 (2d Cir. 1972), this Court, noting the "universally known possibility" that cooperation with law enforcement officials would be entitled to consideration at

³ Appellant was arrested in possession of 17 ounces of heroin; he was to have received \$500 for transporting this heroin from Chicago to New York. In addition, appellant had previously made 10-12 such trips to transport heroin to New York. (See the pre-sentence report which appellant has requested be made a part of the record and which we will arrange to have transmitted to each member of the panel which will hear the case should it be requested.)

sentencing, specifically rejected the argument that the sentencing judge's consideration of lack of cooperation with the prosecution was a violation of the defendant's right against self-incrimination. In so doing, the *Sweig* panel stated that the case before it was "indistinguishable" from *United States v. Vermeulen*, 436 F.2d 72 (2d Cir. 1970), *cert. denied*, 402 U.S. 911 (1971).

In *Vermeulen*, the defendant who had pleaded guilty to a two count information, claimed that the district court's imposition of maximum consecutive sentences because of his refusal to cooperate with the government was a violation of his Fifth Amendment right against self-incrimination. This Court affirmed the judgment, however, finding that there was no Fifth Amendment violation and distinguishing the situation in *Vermeulen*, where the sentencing judge considered the defendant's unwillingness to cooperate and give information concerning the criminal involvement of others, from a situation such as that in *Thomas v. United States*, 368 F.2d 941, 945-946 (5th Cir. 1966), where a sentencing judge sought a confession as a sign of repentance from a defendant who had pleaded not guilty and been convicted by a jury. In the latter situation, where the defendant has a right to appeal the conviction, Fifth Amendment considerations arise which are not present where a guilty plea has been entered. And the *Vermeulen* Court approved the procedure of sentencing the defendant in that case to maximum consecutive terms with the "caveat" that future cooperation might be helpful in getting the sentence reduced.⁴

Indeed, it is beyond question that cooperation with government authorities is a mitigating circumstance which can always be presented for consideration at both

⁴ The *Vermeulen* court also noted that if the defendant had wished to cooperate but feared self-incrimination, he could have put the court and the government on notice by asserting his Fifth Amendment privilege, which he did not. 436 F.2d at 76-77.

sentencings and motions for reduction of sentence. See, e. g., *United States v. Malcolm*, 432 F.2d 809, 817 (2d Cir. 1970):

There can be no question that a defendant's cooperation in the investigation . . . is highly material to mitigation of punishment not only because the defendant should be rewarded for his services to the community but also because cooperation with law enforcement authorities is a significant step toward rehabilitation.

Appellant argues that this Court should utterly disregard *Sweig*, *Vermeulen* and *Malcolm* and follow the Third Circuit's opinion in *United States v. Garcia*, 544 F.2d 681 (3d Cir. 1976). In *Garcia*, two defendants who had pleaded guilty to one count of an indictment were informed by the sentencing judge that he could not extend "clemency and lenity" to them because of their complete refusal to cooperate with the government. On appeal, a panel of the Third Circuit held that the principle against self-incrimination had been contravened by the weight accorded the defendants' failure to cooperate with government authorities. In so holding, the court stressed the fact that the defendants had not received immunity and had no guarantee that they would not subsequently be indicted for acts outside of the indictment which their cooperation might bring to light. *United States v. Garcia*, *supra*, 544 F.2d at 684-685. Accord, *United States v. Grayson*, 550 F.2d 103, 106 n. 5 (3d Cir. 1976).

This case is clearly distinguishable from *Garcia*. Although there is no specific statement in the *Garcia* opinion that the defendants actually raised a Fifth Amendment claim before the sentencing judge, the panel's discussion of the limited nature of the pleas and the defendants' complete refusal to cooperate indicates that the court found the Fifth Amendment claim to have been implicit in the defendants' actions. We submit that there

is no such undercurrent of an unstated Fifth Amendment claim in the instant case. As mentioned above, appellant had previously waived his Fifth Amendment privilege and given a full statement to the government. The only reason given for appellant's refusal to cooperate and testify was fear of recrimination against his family. Thus, there was neither an explicit nor implicit Fifth Amendment claim.

Moreover, to the extent that the *Garcia* decision could be said to stand for the proposition that a sentencing court may not take into account the defendant's lack of cooperation, we respectfully urge this Court to reject it. At the very least, to the extent that a refusal to cooperate indicates a lack of rehabilitation, see, *United States v. Malcolm*, *supra*, it is a factor which may properly be considered when sentence is imposed.

Finally, appellant claims that *United States v. Robin*, 545 F.2d 775 (2d Cir. 1976), calls for this court's review of the sentence. *Robin*, however, dealt with facts totally dissimilar from those in appellant's case. In *Robin*, the defendant was not allowed adequate time to study or rebut the veracity of allegations in a lengthy and detailed presentence memorandum that he was a major trafficker in heroin. On appeal, this court found that there was, therefore, a serious question as to the accuracy of the facts before the sentencing judge and remanded the case for re-sentencing. Appellant, however, has never asserted that his counsel lacked adequate opportunity to respond to the pre-sentence report or that any information in the report was false, inaccurate, or misleading.

B. The sentence imposed on appellant constituted neither cruel nor unusual punishment

Appellant argues that the sentence of 10 years imprisonment and 10 years special parole violated the Eighth Amendment because it was "grossly unjust." The claim is frivolous, for it is well settled that a sentence

which is within statutory limits is not subject to appellate review. *United States v. Seijo*, *supra*, 537 F.2d at 700; *accord*, *Dorszynski v. United States*, 418 U.S. 424, 431-432 (1974); *United States v. Tucker*, 404 U.S. 443, 447 (1972); *Townsend v. Burke*, 334 U.S. 736, 741 (1948).

In support of his contention, appellant cites only *Davis v. Davis*, 45 U.S.L.W. (U.S.D.C. W. Va., May 5, 1977), in which, in the setting of an apparently uncontested habeas corpus application, the United States District Court for the District of West Virginia found that a sentence of 40 years imprisonment and \$20,000 in fines for a conviction of possessing and distributing approximately 9 ounces of marijuana was so grossly out of proportion to the severity of the crime as to constitute cruel and unusual punishment in violation of the Eighth Amendment. The facts of this case are totally distinguishable from those in *Davis*. Here, the appellant was convicted of trafficking, not in a few ounces of marijuana, but in almost a pound of heroin, one of the most pernicious drugs on the illicit market. As indicated in the pre-sentence report, appellant was not a user; his motive for trafficking was easy profit. He was to have received \$500 for transporting the heroin from Chicago to New York and had made 10-12 such trips to transport heroin before his arrest. Thus, even if one accepts the underlying rationale of *Davis* (that a sentence within statutory limits may nevertheless be set aside simply because of its length) which we do not, it is clear that *Davis* would constitute no authority for review of the sentence in this case.

C. The sentencing procedure did not violate appellant's right to due process of law

Appellant finally argues, without elucidation, that the sentence violated his Fifth Amendment right to due process because it was "arbitrary."

The claim is totally without merit. Review of the record reveals that all procedural due process was afforded appellant at sentencing. Both counsel and appellant were afforded an opportunity to personally address the court and present any information they deemed relevant to sentence. There is no allegation that any false or misleading information was before the judge. As noted above, the record further reflects that the sentence was based on all the information before the judge and was reasonably related to the seriousness of the crime involved. There was, therefore, no violation of appellant's Fifth Amendment right to due process.

CONCLUSION

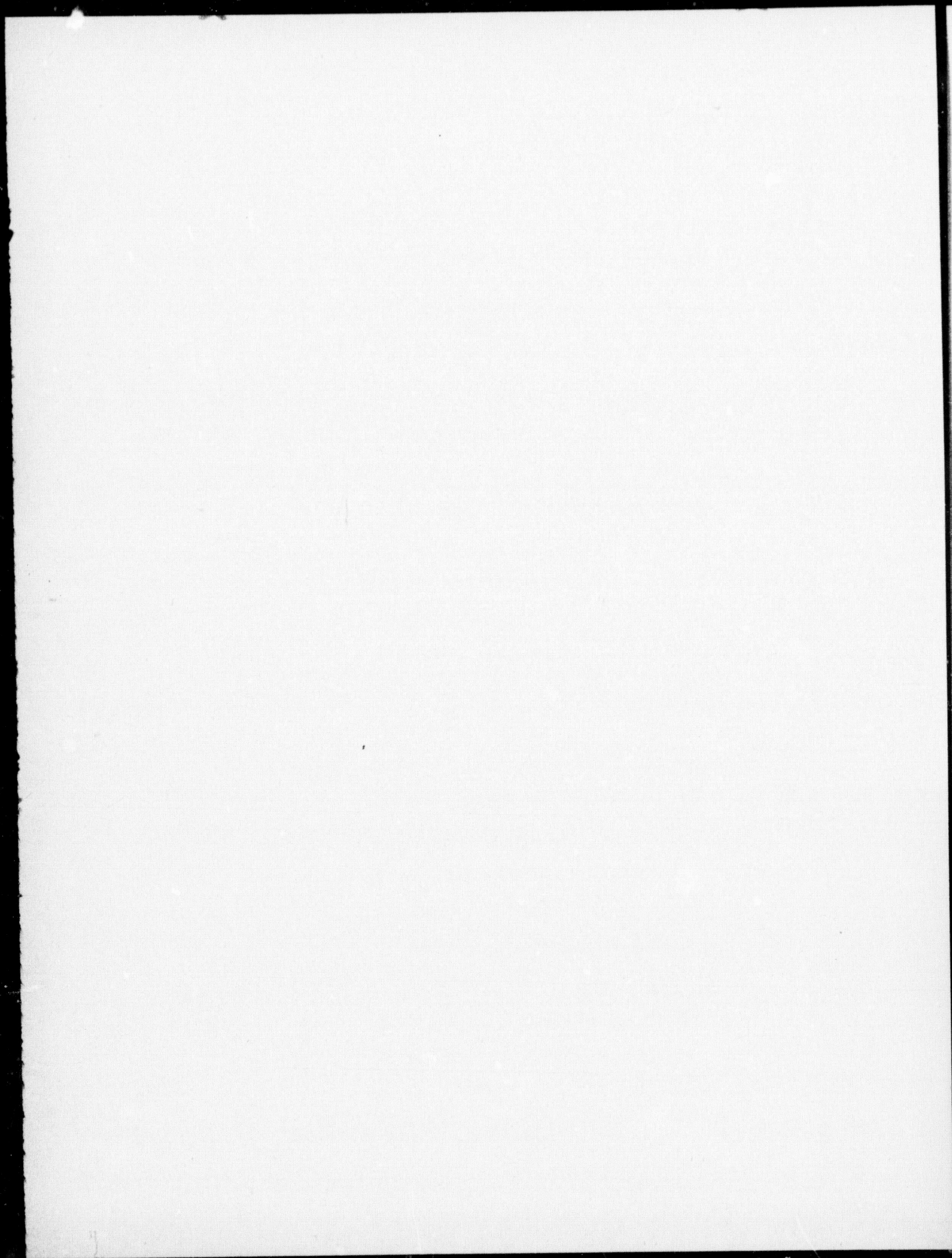
The judgment of conviction should be affirmed.

Dated: Brooklyn, New York
September 12, 1977

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

Dolores Byrd

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 15th day of Sept. 19 77 he served a copy of the within
Brief For The Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Allen Harris & Carmise J. Perotta, Esqs.

80 Broad St., New York, N.Y. 10004

and deponent further says that he sealed the said envelope and placed the same in the mail chute
drop for mailing in the United States Court House, 225 Cadman Plaza East, Borough of Brooklyn, County
of Kings, City of New York.

Dolores M. Byrd

Sworn to before me this

15th day of Sept. 19 77

Barbara A. Allen

BARBARA A. ALLEN
Notary Public, State of New York
No. 24-464824
Qualified in Kings County
Commission Expires March 30, 1979